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NO. 87-1020

Supreme Court, U.S.
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JOSEPH E. SPANIOLO, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PAUL S. DAVIS,

Appellant

v.

STATE OF MICHIGAN,
DEPARTMENT OF THE TREASURY,

Appellee

ON APPEAL FROM THE
COURT OF APPEALS OF MICHIGAN

REPLY BRIEF FOR APPELLANT

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In the opinion of the Appellant the issues in this case and the pertinent authorities have been fully set forth in the Briefs filed by Appellant and by the United States and the National Association of Retired Federal Employees ("NARFE"), as amici curiae. However it appears appropriate to answer some of the arguments presented by Appellant in its Brief.

1. A RETIRED FEDERAL EMPLOYEE HAS A LEGAL RIGHT, AS AN INDIVIDUAL TAXPAYER, TO ASSERT OBJECTIONS TO A STATE TAX ON THE GROUND OF DISCRIMINATION IN VIOLATION OF 4 U.S.C. 111.

Appellee the State of Michigan in its Brief contends that an individual Federal employee may not assert rights based on discrimination in violation of 4 U.S.C. 111, but that such rights may be asserted only by the Government (Brief, Point I, A, especially pages 11 to 24). Appellee relies on Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939), in which this Court approved State taxation of Federal salaries and overruled prior conflicting cases.

Appellee cites language in the Graves case stating that no showing had been made of any burden on the Government. However, in that case there was no allegation of discrimination. Hence there was no occasion for the

Court to consider the rights and remedies of a Government employee who might have been the subject of discrimination. The cases discussed in the Briefs of Appellant and the amici curiae, including particularly Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983), Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 (1960), and Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961), all show that where discrimination is shown against a party dealing with the Government, that party has in each case been permitted to assert his rights.

Appellee refers to language in the House and Senate Committee Reports on the bill which became the Public Salary Tax Act concerning the prohibition against discrimination (Brief, pages 34 to 37). Appellee cites language concerning the protection of the Federal

Government from threats to its "efficient operation." But the language of the statute is much broader, since it prohibits any discrimination in the State tax law against the Government officer or employee "because of the source of the pay or compensation," language clearly applicable to the present case.

The Court's opinion in the Graves case, in sustaining the right of a State to tax Federal salaries, emphasized that it was considering a "non-discriminatory" tax on income (306 U.S. 466 at 480, 485). Justice Frankfurter's concurring opinion stated that "state and Federal governments must avoid exactions which discriminate against each other" (page 488).

It may be noted that the argument of Solicitor General Jackson for the United States, as summarized in the

official report of the Graves case, expressly refers to the tax in that case as being a "non-discriminatory net income tax" (306 U.S. at 474).

The Brief of the United States as filed in that case emphasized that the tax was non-discriminatory, and cited various cases where taxes were sustained as being non-discriminatory (Brief of the United States as Amicus Curiae in the Graves case, October Term, 1938, Case No. 478, pages 99-101). On this point that Brief concluded:

"The increasing frequency with which the Court has emphasized the nondiscriminatory operation of the taxes indicates that it is a factor of considerable importance." (Brief, page 101).

In view of the foregoing, Appellee's arguments based on the Graves case are inapplicable, since that case involved a non-discriminatory tax. By contrast the present case presents a clear case of discrimination in violation of the

mandate of 4 U.S.C. 111.* / Accordingly the Appellant as a Federal retiree is entitled to relief under that statute.

2. APPELLANT IS CLEARLY WITHIN THE SCOPE OF 4 U.S.C. 111.

Appellee in its Brief repeats the reasoning used by the Michigan Court of Appeals, which concluded that Appellant is not within the protection of 4 U.S.C. 111 because he is not a present employee. This argument is discussed in Appellant's main Brief (pages 14 to 18) and in the Briefs of the United States (pages 6 to 7) and of NARFE (pages 5 to 8), which point out that a retiree receives deferred compensation. The NARFE Brief emphasizes the legislative history of the Civil Service Retirement Act.

* / Appendix A to this Brief sets forth a chronology of the legislative history of the Public Salary Tax Act (now 4 U.S.C. 111) and of the Gerhardt and Graves cases in the Supreme Court.

Appellee also argues that the last clause of 4 U.S.C. 111 must be limited to present employees (Brief, page 42). However, the statute must be read as a whole to refer to the compensation "as" an officer or employee, which will include deferred compensation. Accordingly Appellant as a retiree is clearly within the scope of 4 U.S.C. 111.

3. DIFFERENCES IN THE COMPUTATION OF FEDERAL AND STATE RETIREMENT BENEFITS DO NOT JUSTIFY THE DISCRIMINATION AGAINST FEDERAL RETIREES.

Appellee argues that even if there is discrimination in tax treatment of Federal and State retirees, such discrimination is justified by differences between the amounts of Federal and Michigan retirement benefits (Brief of Appellee, pages 49-57). Appellee refers to the Michigan State Employees Retirement Plan as having a "multiplier" percentage for computing the retirement annuity of 1.5%,

as compared with a "sliding scale" multiplier of from 1.5% to 2.5% for Federal retirees (Brief, page 54).

It is submitted that such differences in the annuity computation, and the other differences cited by Appellee in the retirement plans, are irrelevant. The fact of discrimination exists -- Michigan taxes Federal retirement benefits but exempts its own.

As mentioned by Appellee in its Brief (footnote, page 53), Michigan has various retirement plans for different categories of State and local employees. Thus while the State Employees Retirement System uses a multiplier of 1.5% (M.C.L. 38.20), as does the Public School Employees Retirement System (M.C.L. 38.1384), the Michigan Municipal Employees Retirement System uses various multipliers ranging from 1% to 2.5% (M.C.L. 38.1513 to 1522), depending on categories and local options.

The Michigan State Police Retirement System uses a multiplier of 2.4% (M.C.L. 38.1624). The Michigan Judges and Probate Judges Retirement Systems use multipliers of from 2.5% to 3.5% (M.C.L. 38.814 and 916). The Michigan Legislative Retirement System has a multiplier of 4% for the first 16 years, with 1% thereafter up to a maximum benefit of 68% (M.C.L. 38.1023).

With such variations in Michigan retirement benefits, it cannot be said that Federal benefits are necessarily more generous, even if such a comparison is relevant.

In addition, the Michigan Income Tax Act gives a complete exemption to public retirement benefits of any other State (and its political subdivisions) if that State gives a reciprocal tax exemption to Michigan retirees (M.C.L. 206.30(1)(h)(ii), set forth in the Jurisdictional

Statement, Appendix F, page A16, and in Appellee's Brief, page xii).

Appellant submits that the discrimination against Federal retirees is not justified, and is in violation of 4 U.S.C. 111.

CONCLUSION

Appellant submits that the decision of the Michigan Court of Appeals should be reversed. Appellant restates the Conclusion and the prayer for relief set forth in his principal Brief (page 27).

Part II of Appellee's Brief (pages 58 to 83) discusses the appropriate remedies in the event this Court reverses the Court of Appeals and requires equal treatment of Federal and State retirees. Appellant concurs in Appellee's recommendation that in this event the tax exemption be extended to Federal retirees.

Respectfully submitted,

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November 1988

CHRONOLOGY OF LEGISLATIVE
HISTORY OF PUBLIC SALARY TAX ACT
AND SOME SIGNIFICANT SUPREME
COURT PROCEEDINGS -- 1938-39.

1938

- Apr. 7-8 Argument in Helvering
v. Gerhardt
- Apr. 25 President Roosevelt's
Message to Congress
- May 23 Decision in Helvering
v. Gerhardt, 304 U.S. 405
- June 24 Study by Department of
Justice on "Taxation of
Government Bondholders
and Employees -- The
Immunity Rule and the
Sixteenth Amendment."
- Dec. 19 Certiorari granted in
Graves case

1939

- Jan. 19 President Roosevelt's
Second Message to
Congress
- Jan. 26 Hearings before House
Ways and Means Committee
- Feb. 7 House Committee Report
- Feb. 9 House Debate and Passage
of Bill (H.R. 3790)
- Feb. 16 U.S. Government Brief
filed in Graves case
- Feb. 21 Senate Finance Committee
Hearings

CHRONOLOGY, continued

1939

Feb. 24	Senate Finance Committee Report
March 6	Argument in <u>Graves</u> case
March 27	Decision in <u>Graves v.</u> <u>N.Y. ex rel. O'Keefe</u> <u>306 U.S. 466</u>
Apr. 3-6	Senate Debate and Passage of Bill
Apr. 12	Bill signed by President (Public Law 32 -- Public Salary Tax Act of 1939)